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No. 07-835

IN THE

Supreme Court of the United States

COLORADO OFFICE OF CONSUMER COUNSEL,
RHODE ISLAND ATTORNEY GENERAL,
NEW MEXICO ATTORNEY GENERAL,
PUBLIC UTILITY LAW PROJECT OF NEW YORK, INC., AND
NATIONAL CONSUMER LAW CENTER, INC.,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the D.C. Circuit

REPLY BRIEF OF PETITIONERS

GERALD NORLANDER
PUBLIC UTILITY LAW
PROJECT OF NY, INC.
194 Washington Ave.,
Suite 420
Albany, NY 12210
(518) 449-3375

LYNN HARGIS
Counsel of Record
215 Pennsylvania Ave., S.E.
Third Floor
Washington, DC 20003
(202) 454-5183

Attorneys for Petitioners

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ARGUMENT

This case presents two important issues: first, the lawfulness of the Federal Energy Regulatory Commission's (FERC) market-based rates (MBR) program under the Federal Power Act (FPA), and second, whether FERC could avoid review of that question by limiting its inquiry to just certain aspects of the MBR tariffs under investigation, rather than considering, when challenged, whether such tariffs as a whole are just and reasonable and otherwise lawful. In holding that FERC could so limit its review, the court below endorsed a novel limitation of the scope of rate hearings under section 206, including FERC's proposed new rate going forward, that is as worthy of review as the underlying question of the legality of market-based rates.

FERC posits here, despite decades of contrary precedent, that the decision below correctly held that the "plain language" of FPA § 206(a) allows FERC to investigate and modify only "discrete elements" in a rate tariff, while ignoring challenges to the rest of the tariff. *FRBr* 9. In fact, FERC's brief fails to cite a single case that supports this proposition.

Moreover, the MBR tariff that the FERC determined would be the "filed rate" to be enforced "thereafter," as conditioned, was not a "discrete rate element," but was the tariff that determined every wholesale rate and charge, and every rate required filing during its effective "locked-in period." Petitioners challenged the legality of that prospective tariff as failing to provide lawful rates under the FPA and this Court's precedent, and are entitled to be heard on this question.

I. The Cases Cited in FERC's Brief Either Support *Petitioners'* Arguments or Are Irrelevant to an FPA § 206 Rate Investigation.

FERC's brief cites the language in Section 206 that refers to specifying "issues to be adjudicated," and says:

> *Based on that language*, the court correctly concluded that proceedings under Section 824e [Section 206] 'are designed to identify and address...discrete issues.' *Brief for Respondent* at 9 (emphasis added (citations omitted).

But FERC fails to cite a single additional decision, by either a court or FERC, that relies on, or even refers to, this "plain language." The reason is that the decision below represents a first-time interpretation of FPA § 206 that conflicts with 70-plus years of precedent.

In reaching its novel interpretation, the Court of Appeals did *not* rely on FERC's arguments that an agency may generally determine the scope of its own investigations. *FRBr* 8. Rather, it relied on its new interpretation of the "plain language" of Section 206 as authorizing FERC to ignore any arguments raised regarding the legality of its newly modified rates or tariffs *because* FERC had not specifically identified such issues when setting the rate or tariff for investigation.

That is why this case deserves review. No party argued below that the "plain language" of Section

206 controlled this case; the court of appeals raised this interpretation *sua sponte*. There is no record to show whether the court was even aware of, or focusing on, the fact that Section 206 also controls FERC's review and modification of both *initial* and established rates, and provides the remedy for unlawful rate *changes*. The court's new interpretation would allow FERC to know, *in advance of hearing,* everything that might be unlawful about an initial rate, rate change or long-established rate, *before* evidence or argument are received. Not only is it impossible for FERC to have advance knowledge of what a rate hearing will uncover, but requiring that it have such knowledge, and must list all specific remedies before the hearing begins, makes a sham of the hearing.

For many decades, FERC has not permitted sellers to adjust only one rate element, even increased taxes, without supporting the changed rate as a whole. The reason is obvious for cost-based rates: although one cost may have increased, other costs may have decreased.[1] It would be highly inconsistent if FERC itself could ignore this requirement when it proposed modified rates under Section 206. Even if the cost argument does not apply to market rates under FERC's theories,

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1 *Metropolitan Edison Co. and Pennsylvania Electric Co.*, 43 F.E.R.C. ¶ 61,200, 1988 FERC LEXIS 197 at * 3-4 (1988) ("The Commission also stated [in cited case] that it will review such rate filings [tax adjustments] in a manner similar to *any other proposed rate change* application under section 205 of the FPA, *i.e.*, the rate and all costs will be examined *in their entirety* as opposed to *an analysis of a single rate component.*" (emphasis added) (citations omitted).

Section 206(a) controls *all* wholesale rates, including cost-based transmission rates, so the statute cannot mean what the decision below says that it means.

FERC has traditionally set rates for hearing broadly, "concerning the justness and reasonableness" of the rates under review,[2] rather than specifying all issues. Indeed, in the proceeding below, FERC broadly set for investigation the "justness and reasonableness of the terms and conditions of all wholesale market-based rate tariffs."[3] Such broad terms allow rates to be investigated for lawfulness and modified as required, depending on what is discovered during the hearing. FERC refused to conduct a rulemaking below, instead of a rate investigation, because it was modifying actual rate schedules. *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations,* 103 FERC ¶ 61,349, FN 5, ¶ 51 (2003).

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[2] *See, e.g.*, "boiler plate" language in: *Oklahoma Gas and Electric Co.*, 122 F.E.R.C. ¶61,071 (2008); *Southern California Edison Co.*, 122 F.E.R.C. ¶61,088 (2008); *City of Concord, North Carolina, et al. v. Duke Power Co.*, 3 F.E.R.C. ¶ 61,292, 61,814, (1995) [complaint]; *Long Island Lighting Co.*, 82 F.E.R.C. 61,124covers changed or initial rates]; *Kansas City P&L Co.*, 55 F.P.C. 2725 (1976) [initial rate]; *Central La. Electric Co.*, 55 F.P.C. 2520 [changed or initial rates].

[3] *Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations*, 97 F.E.R.C. ¶61,220 (2001) ("In this order, the Commission institutes a proceeding pursuant to Section 206 of the Federal Power Act to investigate *the justness and reasonableness of the terms and conditions* of market-based rate tariffs and authorizations of public utilities that sell electric energy and ancillary services at wholesale in interstate commerce." (emphasis added).

FERC's brief cites *Georgia Power Co. v. FPC*, 373 F.2d 485 (5th Cir. 1967), for the proposition that FERC may remedy one unlawful portion of a rate without holding a "full rate hearing." *FRBr* 11. In that case, the utility seller claimed that if FERC changed one part of its contract under Section 206, it must identify other affected parts of the same contract. FERC did not dispute this contention, responding: "Georgia Power had *an opportunity at the hearing* to show what its economic losses would be with the elimination of the deleted provisions but totally failed to do so." *Id.* at 487 (emphasis added). The Court agreed. *Id.*

Georgia Power, where the objecting party had an opportunity to make its arguments, but failed to take advantage, does not support FERC's refusal to consider or address petitioners' economic, legal and statutory arguments.

The other cases FERC cites also lend no support the decision below. In *New York v. FERC*, 535 U.S. 1 (2002), FERC had set for hearing under Sections 205 and 206 the question of whether there was undue discrimination in transmission rates and service for wholesale power, found there was, and remedied it. FERC declined to also remedy any similar undue discrimination for transmission of *retail* power. Petitioners here did not ask FERC to expand its remedies from wholesale tariffs to retail tariffs; rather, they asked FERC to ensure that the MBR wholesale tariffs as conditioned would result in just and reasonable wholesale rates for the period they covered.

Similarly, in *Alliant Energy Corp. v. FERC*, 253 F.3d 748 (D.C. Circuit 2001), the court of appeals rejected an attack on an entire separate category of tariffs, which were never placed at issue in the proceeding. *Id.* at 754. *Alliant Energy* thus has no relevance, because the justness and reasonableness of the terms and conditions of all wholesale MBR tariffs *were* placed at issue by FERC here; FERC simply proposed to remedy only certain aspects of such unlawful tariffs, despite its statutory obligation to determine lawful rates going forward.

Mobil Exploration & Producing Southeast, Inc. v FERC, 498 U.S. 211 (1991) is totally inapposite because it involves a *rulemaking*, not a rate adjudication, conducted under the Administrative Procedures Act and the Natural Gas Policy Act of 1978, neither of which has a comparable provision to FPA §206 (or NGA §5). The petitioners in *Mobil* were allowed to challenge FERC's statutory authority to issue the orders under review.

Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council, Inc., 435 U.S. 519 (1978), is likewise a decision regarding a rulemaking conducted under statutes that do not contain a ratemaking mandate. *FRBr* 10. Similarly, *FCC v. Pottsville Broad Co.*, 309 U.S. 134 (1940), does not involve rate determinations, but rather a proceeding for a permit to erect a radio broadcasting station under a standard of "public convenience, interest, or necessity." *Id.* at 145.

Oddly, FERC cites *FPC v. Tennessee Gas Transmission Co.*, 371 U.S. 145 (1962), for the proposition that "the Commission may impose relief

with regard to a particular rate element after finding that element unjust and unreasonable, even though *other rate issues are still being litigated."* (emphasis added). *FRBr* 11. There, before an ongoing rate case under NGA §5 was concluded, FERC ordered interim relief by reducing the rate of return. The gas company argued that the agency should have waited until the entire rate case was finished, but this Court upheld the Commission's view that:

> The [natural gas company] *having initially filed the rates* and either collected an illegal return or failed to collect a sufficient one must, under the theory of the Act, *shoulder the hazards incident to its action* including not only the refund of any illegal gain but also its losses where its filed rate is found to be inadequate."

371 U.S. at 153 (emphasis added).

Petitioners find this precedent irrelevant to the rate investigation below that was *not* ongoing, but instead was truncated by FERC to include only consideration of a single tariff condition. Also, because the *customers* did not "initially file" the MBR tariffs or FERC's proposed conditions, it is unclear why they should "shoulder the hazards incident to" to actions of the Commission.

FPC v. Natural Gas Pipeline Co., 315 U.S. 575 (1942), also fails to support FERC's arguments or the decision below. *FRBr* 11. There, this Court said:

> [W]hile the proceedings were not ended by the interim order, the companies had full opportunity to offer

> all their evidence both direct and in rebuttal.

315 U.S. at 583-84.

Nothing in this decision supports *cutting off* consideration of the evidence and arguments offered by petitioners.

It is telling that FERC cites no cases that actually support the statutory interpretation offered by the court below. This Court may well ask itself why, given the thousands of rate cases decided under FPA §206 and NGA §5 since 1935, FERC's brief was unable to cite a single one that actually supports its argument or the court's interpretation.[4] Moreover, FERC attempts no response to petitioners' arguments regarding the *Mobile/Sierra*[5] cases. *PetBr* 2, 9-11. There, this Court said in discussing the NGA equivalents of FPA §§205 and 206:

> The *scope and purpose* of the Commission's review [under the two statutory sections] remain *the same*—to determine whether the rate fixed by the natural gas company [public

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[4] Utility respondents resurrect procedural arguments made below regarding whether petitioners properly notified FERC they were challenging the justness and reasonableness of its "filed rate" going forward. *Utility Respondent' Brief (UtilBr)* at 12-14. The court below found these arguments unpersuasive, as should this Court.

[5] *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956) ("*Mobile*") and *Federal Power Comm'n. v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956) ("*Sierra*").

utility] is lawful. *Mobile* 350 U.S. at 341 (emphasis added)[6]

II. FERC's Brief Attempting to Distinguish the Requirements for Specific Rates in *Maislin* and *MCI* From the Specific Rates Required by the FPA is Utterly Silent Regarding Rate *Increase* Filings Under Section 205(d).

Even though petitioners argued the importance to consumers of the FPA's mandated filing requirements for all rate *increases* under the MBR tariff below, FERC's brief does not even mention FPA §§205(d) and 205(e) when it attempts to distinguish the rate tariffs eliminated in *Maislin Ind. U.S., Inc., et al. v. Primary Steel Inc., et al.*, 479 U.S. 116 (1990) and *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218 (1995). *FRBr* at 14-16. Instead, FERC insists (as it did to the Ninth Circuit in *Lockyer, et al. v. FERC, et al.* 383 F.3d 1006 (9th Cir. 2004), *cert. denied*, 127 S. Ct. 2972) that the combination of an MBR tariff stating that rates will be whatever the parties agree (because FERC has found the seller has no market power), *plus* the actual charges revealed later in "reporting requirements," *together* constitute the rate schedules required to be filed under section 205(c). 383 F.3d at 1009, *FRBr* 14.

Even assuming FERC is correct as to its discretion regarding what constitutes a "rate schedule" under Section 205(c), the elimination of

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[6] Utility respondents try to distinguish *Mobile* as not a "policy-making procedure." *UtilBr* 18. However, this Court said in *Mobile*, an NGA §4 [FPA §205] rate investigation (*Sierra* was an FPA §206 rate investigation): "The question presented is solely one of the proper interpretation of the Natural Gas Act,...." 350 U.S. at 337.

FPA filings for rate *increases* under Section 205(d) goes entirely unanswered. It follows logically, from FERC's insistence that the "reporting requirement" is an essential part of the filed rate, that whenever one of the actual reported charges *increases* or otherwise changes for a particular customer, FPA Section 205(d) would apply to that "change."[7] Section 205(d) requires sixty days' advance notice *by filing* all changes in rates and charges with FERC for public inspection. 16 U.S.C. §824d(d). Unlike Section 205(c), the only discretion given to alter this filing mandate is for FERC, for good cause shown, to issue "an order *specifying the changes so to be made* and the *time when they shall take effect* and the manner in which they shall be filed and published." *Id.* (emphasis added).

Far from claiming that its MBR regime has ever complied with the Section 205(d) requirement that it issue such an order, FERC simply ignores this part of the statute in its brief. It elsewhere claims that the charges "reported" in the quarterly report are simply informational filings that do not constitute "rate changes." *Southern Co. Energy Mkt., et al.*, 86 F.E.R.C. ¶61,131 at 61,459-60, 1999 FERC LEXIS 256 at *16-23 (1999). But this undermines FERC's argument that the "quarterly reports" constitute a necessary element of the "filed rate" which, coupled with MBR tariffs, satisfy Section 205(c)'s requirement that schedules of all rates and charges must be on file. *FRBr* 15.

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[7] *Cf., Florida Power & Light Co. v. FERC*, 617 F.2d 809 (1980).

The result is that there are never any "rate increases" recognized under the MBR tariff, no matter how high a customer's rates may rise, and, as a result, none of the consumer protections of section 205(e) [16 USC §824d(e)] against unlawful rate increases will ever be triggered.

Petitioners have argued throughout that neither the FERC nor the courts may simply eliminate the primary consumer protection provisions of a statute designed to protect ratepayers. Only Congress may do so, and it has not. FERC's attempt to distinguish *Maislin* and *MCI* fails, because FERC relies on the "reporting requirements" to complete the FPA's mandate that all rates and charges must be filed, while at the same time denies that any increased charge "reported" for any customer is a "change in rate."

In *Lockyer,* the Ninth Circuit recognized that something was seriously amiss, and that FERC could not treat the "reports" as part of the rates for certain purposes but not others; yet it essentially allowed FERC to do just that by allowing it to "substitute" its own remedies for the statutory ones. *Lockyer*, 383 F.3d at 1014-1018.

As this Court found in 1956, filing rates is the *basic duty* of the regulated entities, and notice by filing is necessary to allow the FERC to review rate increases under [FPA §205(d)] to determine whether the consumer protections of [FPA §205(e)] should be triggered. *Mobile*, 350 U.S. at 341-42. Because there were no advance rate change filings under the MBR tariff below, petitioners, at a minimum, were denied their right to see, review and challenge all rate

increases that occurred during the locked-in period, with the burden of proof on the seller.

By effectively eliminating from its MBR regime §§205(d) and 205(e), the FPA provisions protecting ratepayers from excessive rate increases, FERC has totally transformed the rate filing and review system enacted by Congress in 1935, which it previously recognized.[8] As this Court correctly held in *MCI*, it is irrelevant whether or not the MBR regime instituted by FERC is a better one than Congress chose; only the Congress may make that change. 512 U.S. at 234.[9]

CONCLUSION

The Court should grant the petition for a writ of certiorari, reverse the decision below as wrongly interpreting FPA Section 206, and remand the proceedings to allow petitioners to be heard on the merits of their economic and statutory challenges to the MBR tariffs in effect during the locked-in period.

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[8] *Prior Notice and Filing Requirements Under Part II of the Federal Power Act*, 64 F.E.R.C. 61,139, 1993 FERC LEXIS 2205 (1993).

[9] FERC and Utility Respondents imply that the Energy Policy Act of 2005 (EPAct 2005), (which Utility Respondents call the Electricity Modernization Act of 2005) somehow eliminated the filing and review requirements of FPA Sections 205 and 206. The court below correctly rejected these arguments. *Appendix for Petitioner* at 3a.

Respectfully submitted,

Lynn N. Hargis
215 Pennsylvania Ave., S.E.
Washington, D.C. 20003
(202) 454-5183
Counsel of Record

Gerald A. Norlander
Public Utility Law Project
of New York, Inc.
194 Washington Ave., Suite 420
Albany, NY 12210
(518) 449-3375

Counsel for Petitioners Colorado Office of Consumer Counsel, Rhode Island Attorney General, New Mexico Attorney General, Public Utility Law Project of New York, Inc., and National Consumer Law Center, Inc.